

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALLEN GREEN,

Defendants.

**8:05CR288**

**ORDER**

This matter is before the court regarding whether a certificate of appealability should issue in this case. On or about July 24, 2012, the court issued a dismissal order, Filing No. [178](#), denying defendant's motion to vacate pursuant to [28 U.S.C. § 2255](#). The court denied this motion on the basis that it constituted a successive petition, and that on initial review, defendant was not entitled to relief.

Before the defendant may appeal the denial of his § 2255 motion, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of [28 U.S.C. § 2253\(c\)](#). [28 U.S.C. § 2253\(c\)\(2\)](#) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

. . . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

[28 U.S.C. § 2253\(c\)](#).

A “substantial showing of the denial of a federal right” requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” [Slack v. McDaniel, 529 U.S. 473, 484 \(2000\)](#). In contrast, if the district court denies a § 2255 motion on procedural grounds without reaching the underlying constitutional claims on the merits, a certificate of appealability should issue under [28 U.S.C. § 2253\(c\)](#) when the defendant shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and would find it debatable whether the district court was correct in its procedural ruling. *Id.*

For the reasons set forth in the Memorandum and Order denying the defendant’s § 2255 motion (Filing No. [178](#)), I conclude that the defendant has not made a substantial showing of the denial of a constitutional right and has not shown that this court’s order was debatable or incorrect, as required by [28 U.S.C. § 2253\(c\)](#). Accordingly, a Certificate of Appealability is denied. However, [Fed. R. App. P. 22\(b\)](#) permits the defendant to request a Certificate of Appealability from the Court of Appeals.

THEREFORE, IT IS ORDERED:

1. That the defendant may proceed in forma pauperis on appeal as set forth in Filing No. [181](#);

2. That no Certificate of Appealability will issue; and
3. That the Clerk of Court shall process this appeal to the Eighth Circuit.

Dated this 29th day of August, 2012.

BY THE COURT:

s/ Joseph F. Bataillon  
\_\_\_\_\_  
United States District Judge

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